

## **House of Commons International Development Committee Inquiry into Financial Crime and Development**

### **Submission by Transparency International UK (TI-UK)**

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#### **Introduction**

1. A description of Transparency International UK (TI-UK) is provided in the Annex.
2. TI-UK welcomes this inquiry by the House of Commons International Development Committee (IDC). The term 'financial crime' is broad and is usually understood to include bribery and corruption, money laundering, theft and fraud. As an anti-corruption organisation, TI-UK is primarily concerned with the prevention of bribery, corruption and money laundering, although we recognise that fraud can often be an element of these financial crimes. TI defines corruption as the abuse of entrusted power for private gain.
3. When UK nationals and companies pay bribes overseas in the developing world to win business unfairly, and when UK institutions provide a safe haven for the illicit wealth of corrupt foreign leaders, the UK becomes complicit in perpetuating corruption in these countries. Corruption has a hugely damaging impact on growth and sustainable development because it diverts scarce resources from development programmes, undermines the rule of law and weakens public and private institutions that are essential for growth and stability.
4. Since the victims of bribery by UK companies and money laundering by UK institutions are to be found mainly in poorer developing countries, it is important that those convicted for such financial crimes should be required to make reparations to these countries. It should be left to the courts to decide when it is appropriate to make reparations and the scale of such payments. Judicial settlements of key foreign bribery cases during the past two years have already established a precedent by making provision for such reparations. However, it is unclear how these provisions have been implemented and this has raised important questions about the modalities for making reparations and ensuring that the funds are put to productive uses in the receiving country (assuming that the country agrees to receive them).
5. The rest of this submission by TI-UK is organised in two parts. Part I addresses the first five questions outlined in the IDC's notice, covering issues related to reparations to the victims of foreign bribery and whether any changes are needed to UK legislation, particularly the Bribery Act 2010. Part II addresses the last two questions in the IDC's notice, covering issues related to resources and coordination of UK law enforcement against transnational financial crimes, with particular reference to foreign bribery.

#### **I. REPARATIONS TO THE VICTIMS OF FOREIGN BRIBERY**

6. The relevant questions raised in the IDC's notice are as follows:

- How BAES will ensure that its payment to Tanzania is used effectively for development purposes.
- What advice DFID has given to BAES and other bodies about how this money might be used.
- Whether the law needs to be changed to ensure that British companies and individuals found guilty of financial crimes in developing countries are always required by the court to make reparations to the developing country concerned.
- Whether further changes to the Bribery Act 2010 or other legislation are required.

### **Bribery cases**

7. During the past two years key judicial settlements of foreign bribery cases have made provision for reparations to the affected countries. The details of these cases are summarised below.

#### *BAE-Tanzania*

8. In February 2010, an agreement was concluded between BAE and the Serious Fraud Office (SFO) and the US Department of Justice (DOJ) concerning BAE defence contracts in a number of countries. BAE's settlement with the SFO related to its admission that it had failed to keep adequate accounting records in relation to a defence contract for the supply of an air traffic control system to the Government of Tanzania. The company agreed to make an ex-gratia payment of £30 million "for the benefit of the people of Tanzania in a manner to be agreed between the SFO and the company"<sup>1</sup> less any financial orders imposed by the Court. In December 2010, the Court fined BAE £500,000. This meant the company would have to make reparations of £29.5 million to Tanzania.

9. In his sentencing, the presiding Judge, Justice Bean, observed, *inter alia*, that "The victims of this way of obtaining business, if I have correctly analysed it, are not the people of the UK, but the people of Tanzania. The airport at Dar-es-Salaam could no doubt have had a new radar system for a good deal less than \$40million if \$12million had not been paid to Mr. Vithlani. The structure of this Settlement Agreement places moral pressure on the Court to keep the fine to a minimum so that the reparation is kept at a maximum"<sup>2</sup>. It is noteworthy that BAE agreed to make an ex-gratia payment of £30 million less the fine under the terms of its plea negotiations agreement with the SFO. Hence, the £29.5 million was not compensation ordered by the court in accordance with S130 powers of the Criminal Courts (Sentencing) Act 2000.

#### *PWS International Ltd – Costa Rica*

10. In October 2010, Julian Messent who was a director of London-based insurance business PWS International Ltd was sentenced to 21 months' imprisonment after admitting making or authorising corrupt payments of almost US \$2 million to Costa Rican public officials. The Court ordered him to pay £100,000 compensation within 28 days to the Republic of Costa Rica or serve an additional 12 months imprisonment if he failed to do so<sup>3</sup>.

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<sup>1</sup> <http://www.sfo.gov.uk/media/133535/bae%20-%20settlement%20agreement%20and%20basis%20of%20plea.pdf>

<sup>2</sup> <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/r-v-bae-sentencing-remarks.pdf>

<sup>3</sup> <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/insurance-broker-jailed-for-bribing-costa-rican-officials.aspx>

*Mabey & Johnson Ltd*

11. In September 2009, Mabey & Johnson Ltd admitted offences of overseas corruption in Ghana and Jamaica and breaching UN sanctions in Iraq. The company was ordered to pay a total fine of £6.6 million. This included reparations to Ghana, Jamaica and Iraq amounting to £658,000, £139,000 and £618,000, respectively<sup>4</sup>.

*Issues for consideration*

12. Two of these cases indicate that UK judges and prosecutors have already established a principle that in foreign bribery cases, UK companies or nationals convicted of criminal offences can be required to make reparations to the affected countries. As noted earlier, the BAE case was different although the principle of compensation was implicit in the company's agreement to make voluntarily an *ex gratia* payment to Tanzania.

13. Very little information is available in the public domain on the criteria for determining the size of reparation payments. It is also not clear whether the affected countries made any representations that were taken into account in pre-sentencing hearings. There is also a paucity of information on how the reparations in the above cases were implemented and managed. TI-UK understands that in the case of Tanzania, BAE is still in the process of determining how best to make its *ex gratia* payment in ways that would benefit the people of Tanzania. In the case of Mabey & Johnson, TI-UK understands that the government of one of the affected countries was reluctant to receive payment fearing this might imply that its public officials had been guilty of accepting bribes. In the case of Costa Rica, it is not known whether the payment of £100,000 has been made to the Government of Costa Rica.

14. TI-UK believes it is in the public interest, both in the UK and in the affected countries, for information on the criteria for determining the size of reparation payments and the modalities for their implementation to be in the public domain. ***TI-UK recommends that information on current cases be published as soon as possible and that information be made available to the public in all future cases. There should be full transparency in relation to plea agreements in criminal cases and any compromise agreements in civil cases under the Proceeds of Crime Act.***

15. In the cases mentioned above, the UK courts did not make reparations to affected countries contingent upon action by law enforcement authorities in the latter to prosecute persons guilty of receiving bribes. TI-UK believes this is the correct approach. Ideally, affected countries should be encouraged to bring prosecutions and the UK authorities can facilitate this through mutual legal assistance. But in situations where it is highly unlikely that cases will be brought, it would be wrong to penalise the citizens of these countries for corrupt behaviour of their public officials and governance failures. Furthermore, the requirement for convicted companies and individuals to make reparations to affected countries underscores the message that bribery, apart from being a criminal offence in the UK, is also a crime perpetrated against innocent victims in the affected countries.

16. TI-UK believes that it is inappropriate for a convicted company/individual to be involved in the arrangements for disbursing a reparation payment to the affected country. The citizens of the latter are likely to find it reprehensible that those who have committed criminal offences should be

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<sup>4</sup> <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/mabey--johnson-ltd-sentencing-.aspx>

involved in decision-making on such a sensitive matter. ***TI-UK therefore recommends that, in any future cases that make provision for reparation to affected countries, the convicted company/individual should have no role in the implementation of reparation payments.***

17. Another issue for consideration is the challenge of making reparation payments to countries where there is a high risk that these funds would not be used productively because of weak governance and endemic corruption. TI-UK believes that such risks should be assessed on a case by case basis with proportionate responses adopted to ensure that compensation payments are used for the public good. Obviously, this is a sensitive matter because some governments may feel that it is their sovereign right to decide how such funds should be used. However, it is entirely legitimate for the UK authorities to press for the adoption of mechanisms and safeguards to ensure that reparations are for the benefit of the people of the affected country.

18. ***TI-UK recommends the following mechanisms for consideration in order to maximise the benefits reparation payments provide to citizens in affected countries:***

1. ***Convicted companies/individuals should not have any role in the modalities for the implementation of reparation payments. They should be required to pay the funds into a fund maintained by the UK Government. Since the Department for International Development (DFID) has the best knowledge and expertise in international development matters, we propose that such a fund be administered by DFID.***
2. ***If corruption risks are low, DFID could make reparation payments directly to the government of the affected country. On the other hand, if a direct payment to the government is judged to be undesirable because of high corruption risk, assuming that the country is a recipient of UK aid, DFID could allocate the funds to the DFID aid programme budget for the country. The funds would be additional to the country's aid budget, disbursed through standard DFID mechanisms and be subject to DFID's standard aid monitoring/auditing procedures. This option could also be used in cases where the government of an affected country is reluctant to receive a reparation payment directly for whatever reason. It would be a pity if its citizens were denied the benefit of such a payment.***
3. ***If there are strong and effective civil society organisations in the affected country, as an alternative to disbursement through government channels, DFID could either: a) use an existing umbrella organisation in the country that is capable of reticulating the funds to effective local NGOs, or b) set up a new trust fund (half of whose trustees would be UK-based) that would oversee disbursements to local NGOs.***
4. ***If the affected country is not a recipient of UK aid, and high corruption risk is a problem, the funds could be provided via the World Bank or an appropriate regional development bank.***
5. ***Regardless of which mechanism is chosen, administrative/transaction costs should be kept to a minimum so as to maximise benefits that can be derived from reparation payments. It is possible that these costs would probably be lower if the funds were provided via a country's DFID aid programme (assuming it has one).***

#### **Changes to legislation**

19. The foreign bribery cases mentioned above demonstrate that there is nothing in current anti-bribery laws and sentencing guidelines that prevent reparations from being made to affected countries. The situation will not change in any way because of the 2010 Bribery Act, which comes into force on 1 July 2011. Hence, TI-UK does not believe it is necessary to make any changes to UK anti-bribery law.

20. However, the foreign bribery cases mentioned above and other cases that have been dealt with in the past few years, suggest that there are some areas where transparency and clarity are needed, that could perhaps be addressed by reviewing certain aspects of the present criminal justice framework and/or Sentencing Guidelines. These include the criteria for determining when reparation should be made to an affected country as well as the criteria for determining the quantum of reparation that should be made.

21. It is not clear why, in some cases during the past few years, no provision was made for reparation even though the offences committed by companies or individuals were of a nature that suggests that reparation was warranted. Examples of such cases include the following:

- In April 2010, DePuy executive Robert John Dougall pleaded guilty to involvement in £4.5 million of corrupt payments to medical professionals within the Greek state healthcare system<sup>5</sup>. He was sentenced to 12 months imprisonment (with leave to appeal) but was not required to make any reparation to Greece.
- In March 2010, Innospec Ltd pleaded guilty to bribing employees of Pertamina (an Indonesian state owned refinery) and other government officials in Indonesia<sup>6</sup>. The company was required to pay a penalty of the sterling equivalent of US\$12.7 million but was not required to make any reparation to Indonesia. However, the Judge referred to the desirability of the company paying compensation if it had been in a stronger financial position. He indicated that because of the seriousness of the case, it was important to levy a large fine that would have the necessary deterrent effect. But this meant giving a fine primacy over the issue of compensation.

**22. TI-UK therefore recommends that a review be undertaken of relevant aspects of the criminal law and Sentencing Guidelines to improve transparency and clarity in the criteria for determining when reparation should be made to an affected country and the quantum of reparation.**

## II. RESOURCES FOR LAW ENFORCEMENT AND ITS COORDINATION

23. The relevant questions raised in the IDC's notice are as follows:

- Whether the UK prosecuting authorities have the resources and powers they need to prosecute transnational financial crimes, particularly when there are also criminal proceedings in another jurisdiction in respect of the same issue.
- How the Government co-ordinates its policy against transnational financial crime.

### Resources

24. The investigation and prosecution of transnational financial crimes, especially when they involve multiple jurisdictions, can be complex, time-consuming and therefore relatively more resource-intensive than law enforcement in other areas. During the past few years, the SFO has been involved in multi-jurisdiction cases, notably those involving BAE and Innospec. Provided the extra-territorial reach of the Bribery Act has not been weakened by certain parts of the Government's final Guidance to companies under Section 9, it is possible that UK law enforcement will become involved in a larger number of multi-jurisdiction cases.

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<sup>5</sup> <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/british-executive-jailed-for-part-in-greek-healthcare-corruption.aspx>

<sup>6</sup> <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/innospec-judgment.aspx>

25. The issues of resources and the institutional arrangements for law enforcement against financial crimes are of increasing concern to TI-UK. The budget of the SFO, which leads the UK's enforcement efforts, has already been reduced substantially. It is reported<sup>7</sup> that the SFO is to be disbanded with its investigative function merged with a new National Crime Agency (NCA) (expected to be set up in 2013) and its prosecutorial function subsumed into the Crown Prosecution Service. Since the NCA (into which the Serious Organised Crime Agency will be subsumed) is expected to have a mandate to focus chiefly on antiterrorism and organized crime, there is a danger that the prosecution of bribery will be given a much lower priority. The separation of the investigatory and prosecutorial functions may also have an adverse impact on law enforcement against bribery. The Home Office has stated that, "No decisions have been taken"<sup>8</sup> on institutional restructuring. Unfortunately, uncertainty about the future has led to the departure from the SFO of several senior prosecutors in recent months.

**26. TI-UK recommends that adequate financial and human resources should be allocated for the effective prosecution of transnational financial crimes. Any changes to the institutional arrangements for the investigation and prosecution of foreign bribery should not result in fewer resources for enforcement, a downgrading of the priority given to combating foreign bribery and a fragmentation of responsibility for investigations and prosecutions among different agencies.**

### **Coordination**

27. Several government departments and agencies are currently involved in combating transnational financial crime and there is clearly scope for improved coordination. It is unclear how the changes the Government proposes to make to law enforcement will affect coordination. The lack of transparency in this area could be remedied through publication by the Government of its proposals and a proper public consultation. Furthermore, the publication of an annual Action Plan for combating international corruption, including transnational financial crime, and periodic reviews of its implementation would make transparent the UK's priorities, the resources devoted to them, and the effectiveness of activities to implement the Plan. A number of benefits can be expected to flow from mechanisms to improve co-ordination, oversight and reporting, including more efficient use of scarce resources by avoiding duplication of effort and consistency in policy across departments.

**28. TI-UK makes the following recommendations to increase transparency and improve co-ordination, oversight and reporting:**

- **A public consultation on the Government's proposals for re-organising the machinery for law enforcement against financial crime;**
- **Annual progress reports by the Secretary of State for Justice, who is the Government's Anti-Corruption Champion, on the implementation of the Action Plan;**
- **Creation of a new House of Commons committee to provide oversight of the implementation of the Action Plan - this committee could be made up of members of the following committees (recognising the cross-cutting nature of efforts to tackle corruption and transnational financial crimes): Business, Innovation and Skills; Defence; Foreign Affairs; International Development; Justice; and Treasury; and**
- **Establishment of a cross-Whitehall group of officials to coordinate cross-Departmental work to deliver the Action Plan.**

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<sup>7</sup> Alex Spence, 'Elite force won't have time to chase fraudsters, lawyers fear', The Times 21 February 2011.

<sup>8</sup> Ibid

Transparency International UK ([www.transparency.org.uk](http://www.transparency.org.uk)), the UK national chapter of TI, fights corruption by promoting change in values and attitudes at home and abroad, through programmes that draw on the UK's unique position as a world political and business centre with close links to developing countries.

TI-UK:

- Raises awareness about corruption;
- Advocates legal and regulatory reform at national and international levels;
- Designs practical tools for institutions, individuals and companies wishing to combat corruption; and
- Acts as a leading centre of anti-corruption expertise in the UK.

TI-UK's vision is for a world in which government, politics, business, civil society, domestic and international institutions and the daily lives of people are freed from corruption, and in which the UK neither tolerates corruption within its own society and economy, nor contributes to overseas corruption through its international financial, trade and other business relations.